

Exhibit 64

N1VsHER1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 HERMÈS INTERNATIONAL. et al.,

4 Plaintiffs,

5 v.

22 Civ. 384 (JSR)

6 MASON ROTHSCHILD,

7 Defendant.

8 -----x
9 New York, N.Y.
January 31, 2023
9:30 a.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge
13 -and a Jury-

14

15 APPEARANCES

16 BAKER & HOSTETLER LLP
17 Attorneys for Plaintiffs
BY: DEBORAH A. WILCOX
OREN J. WARSHAVSKY
GERALD J. FERGUSON

18
19 HARRIS ST. LAURENT & WECHSCLER LLP
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20
21 LEX LUMINA PLLC
22 Attorneys for Defendant
BY: RHETT O. MILLSAPS, II

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Mentzer - Cross

1 A. No.

2 Q. Did you ever look at the MetaBirkins Twitter account?

3 A. I don't believe so.

4 MR. MILLSAPS: I have no further questions at this
5 time, your Honor.

6 THE COURT: Any redirect?

7 MR. FERGUSON: No redirect, your Honor.

8 THE COURT: Thank you very much.

9 You may step down.

10 THE WITNESS: Okay.

11 (Witness excused)

12 THE COURT: Am I right that Mr. Rothschild is going to
13 be the next witness?

14 MR. WARSHAVSKY: No, your Honor. It will first be
15 Mr. Martin.

16 THE COURT: Okay.

17 Please call your witness.

18 MR. WARSHAVSKY: Plaintiffs will call Nicholas Martin.
19 NICHOLAS MARTIN,

20 called as a witness by the Plaintiff,

21 having been duly sworn, testified as follows:

22 THE COURT: Now, we have a translator here?

23 THE INTERPRETER: Yes, your Honor.

24 THE COURT: Identify yourself for the record.

25 THE INTERPRETER: Bertrand Sciberras.

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Martin - Direct

1 BY MR. WARSHAVSKY:

2 Q. Did you see other articles about the MetaBirkins?

3 A. Yes.

4 Q. Was there -- just yes or no so counsel can object -- was
5 there anything about those articles that concerned you?

6 A. Yes.

7 Q. Okay. Without characterizing what the writer may have
8 thought, what about those articles concerned you?

9 MR. MILLSAPS: Objection.

10 THE COURT: Well, I think if phrased -- let me ask you
11 this: As a result of viewing those articles, did you or Hermès
12 take further action?

13 THE WITNESS: From one of them, yes.

14 THE COURT: All right.

15 What further action did you take?

16 THE WITNESS: We asked the corresponding media to
17 correct the statement that was made in the article.

18 THE COURT: I think that then is admissible. What was
19 the statement made in the article?

20 THE WITNESS: The article was saying that the
21 MetaBirkin was made by or in partnership with Hermès.

22 THE COURT: All right.

23 Go ahead, counsel.

24 BY MR. WARSHAVSKY:

25 Q. Where was that article published?

N1vnher4

Martin - Direct

1 A. In Challenges.

2 Q. Did Hermès interact with Mr. Rothschild before sending the
3 cease and desist letter?

4 A. No.

5 Q. Has Hermès interacted with Mr. Rothschild since he sent
6 that letter, since Hermès sent that letter?

7 A. No.

8 Q. Did Hermès ever publicize the cease and desist letter it
9 sent to Mr. Rothschild?

10 A. No.

11 Q. Did Hermès tell anybody in the media about the cease and
12 desist letter it sent Mr. Rothschild?

13 A. Apart from asking the Challenge Media to correct the
14 article, no.

15 Q. My question was whether Hermès ever sent the cease and
16 desist letter to the media?

17 A. No. Sorry.

18 Q. Has Hermès been contacted to comment on this case?

19 A. Yes.

20 Q. Has Hermès ever commented on this case?

21 A. No.

22 Q. Yesterday during openings both sides referred to and I
23 think Mr. Millsaps showed a video, something called "The Baby
24 Birkin."

25 Have you ever seen that before?

N1vnher4

Martin - Direct

1 A. Yes.

2 MR. WARSHAVSKY: We would move to admit the Baby
3 Birkin exhibit and show the video.

4 MR. MILLSAPS: No objection.

5 THE COURT: Received.

6 MR. WARSHAVSKY: I think it's Exhibit 82.

7 (Plaintiff's Exhibit 82 received in evidence)

8 (video played)

9 BY MR. WARSHAVSKY:

10 Q. When is the first time you saw that video?

11 A. I think it was in June 2021.

12 Q. Did Hermès send a cease and desist letter or otherwise
13 object to this video?

14 A. No.

15 Q. Why not?

16 A. Because we looked at the surrounding circumstances of this
17 particular NFT and we considered that there was no risk of
18 confusion and no risk of brand dilution.

19 Q. Is it common for Hermès to file lawsuits?

20 A. No.

21 Q. You have worked at Hermès for nearly 20 years, right?

22 A. Yes.

23 Q. In the legal department, right? Always in the legal
24 department?

25 A. Yes.

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Martin - Direct

1 Q. Okay. Other than counterfeiting, you know, like stuff you
2 might see a few blocks from here, do you know the last time
3 Hermès brought a trademark infringement lawsuit in the U.S.?

4 A. I am only aware of one case more than 20 years ago.

5 Q. Before we saw a few -- we have seen a few articles that
6 we've shown the jury, some of those articles, and has Hermès
7 ever sent a cease and desist to the people that published those
8 articles?

9 A. No.

10 Q. Has Hermès ever sued anybody for using the Birkin bag in
11 those articles?

12 A. No.

13 Q. We also saw Mr. Chavez introduce the exhibit which the jury
14 will see which has the Hermès bag in various movies and films.

15 Are you familiar with that exhibit?

16 A. Yes.

17 Q. Has Hermès ever sent a cease and desist letter to any of
18 those users of the Birkin trademark or bag?

19 A. No.

20 Q. Did Hermès ever bring a lawsuit about those?

21 A. No.

22 Q. Have you ever seen artists' paintings of Birkin bags?

23 A. Yes.

24 Q. Did you ever send a cease and desist letter to the artists
25 who painted pictures of the Birkin bags?

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Martin - Direct

1 A. Not that I am aware.

2 Q. Are you aware of Hermès ever suing those artists?

3 A. No.

4 Q. Have you seen sculptures of Birkin bags?

5 A. Yes.

6 Q. Have you --

7 A. Sorry.

8 Q. It was a glitch. Don't worry. I don't think there's
9 anything wrong.

10 Did Hermès ever send a cease and desist letter to the
11 artists who created those sculptures?

12 A. No.

13 Q. Did Hermès ever sue those artists or sculptors or both?

14 A. No.

15 Q. Has Hermès ever seen, people who have taken professional
16 photographs of Birkin bags?

17 A. Yes.

18 Q. Has Hermès ever sent those photographers cease and desist
19 letters?

20 A. No.

21 Q. Has Hermès ever sued those photographers?

22 A. No.

23 Q. And the different artworks we are talking about, whether
24 they're photographs, sculptures, pictures -- paintings rather,
25 whatever, is Hermès aware of those being displayed in

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Martin - Direct

1 galleries?

2 A. Some of them, yes.

3 Q. Did Hermès ever send a cease and desist letter to those
4 galleries?

5 A. No.

6 Q. Did Hermès ever sue those galleries?

7 A. No.

8 Q. We heard some of the cross-examination by Mr. Oppenheim of
9 Mr. Chavez talking about the different numbers. Do you
10 remember that from yesterday?

11 A. Different newspapers?

12 Q. No, I'm sorry. There was a financial table that both
13 Mr. Oppenheim and I questioned Mr. Chavez about.

14 Do you remember that?

15 A. Yes, sorry.

16 Q. That generally was a picture of Hermès financial -- sales
17 information, correct?

18 A. Yes.

19 Q. Its revenues from sales?

20 A. Yes.

21 Q. Okay. Do you know whether the sale of the Birkin handbags
22 suffered as a result of the MetaBirkins NFTs?

23 A. I don't know.

24 Q. Do the Birkin handbag sales increase every year?

25 A. Yes.

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Martin - Direct

1 Q. Did the sales of the Birkin bags increase from 2020 to
2 2021?

3 A. Yes.

4 Q. And did the Birkin bag sales increase last year from 2021
5 to 2022 after the MetaBirkins were released?

6 A. I think, yes.

7 Q. Does Hermès believe it's been damaged by the MetaBirkins
8 NFTs?

9 A. Yes.

10 Q. How so?

11 A. We consider that there's been confusion in the consumers
12 and that our brand has been diluted, and Birkin being one of
13 the most important brands for the group, we think we have
14 suffered damages in relation to this brand dilution and the
15 consumer confusion.

16 MR. MILLSAPS: Your Honor, objection. We move to
17 strike the witness's testimony insofar as he just testified
18 about consumer confusion because there is no evidence admitted
19 of consumer confusion.

20 MR. WARSHAVSKY: I am happy to respond or sidebar,
21 your Honor.

22 THE COURT: Overruled.

23 The objection is overruled.

24 MR. WARSHAVSKY: Thank you, your Honor.

25 BY MR. WARSHAVSKY:

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Martin - Cross

1 AFTERNOON SESSION

2 1:50 p.m.

3 (Jury not present)

4 THE COURT: So this is not our day for jury
5 promptness. Apparently one of the jurors still has not
6 returned from lunch, so we'll wait a few minutes to hear what
7 the story is.

8 Let's get the witness on the stand and stand for the
9 jury.

10 (Jury present)

11 All right. Counsel.

12 CROSS-EXAMINATION

13 BY MR. MILLSAPS:

14 Q. Ashley, would you please put on the screen Plaintiff's
15 Exhibit No. 20, which is in evidence.

16 Mr. Martin, who sent this cease and desist letter to
17 Mr. Rothschild?

18 A. Our lawyers.

19 Q. And your lawyers are your agents, correct?

20 A. What do you mean by agent?

21 Q. Your lawyers act on Hermès' behalf at your direction and
22 control, is that right?

23 A. Yes.

24 Q. So you directed them to send this letter to Mr. Rothschild,
25 correct?

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Martin - Cross

1 A. Yes.

2 Q. Do you remember testifying earlier today that Hermès had no
3 contact with Mr. Rothschild after sending him the cease and
4 desist letter?

5 A. Yes.

6 Q. Isn't it a fact that Mr. Rothschild sent a response to this
7 cease and desist letter through his lawyers just a few days
8 after he received it?

9 A. Yes, he answered.

10 Q. Would you please look at the document in your binder that's
11 been premarked as Plaintiff's Exhibit 21.

12 Do you recognize this document, Mr. Martin?

13 A. Yes.

14 Q. What is this document?

15 A. It's the answers from Mr. Rothschild to our attorney.

16 Q. So, in fact, you did have some contact with Mr. Rothschild
17 after sending your cease and desist letter, is that right?

18 A. Through our attorneys, yes.

19 Q. And your attorneys are effectively Hermès, correct?

20 A. Yes.

21 MR. MILLSAPS: Your Honor, I offer Plaintiff's Exhibit
22 No. 21 into evidence.

23 MR. WARSHAVSKY: No objection, your Honor.

24 THE COURT: Received.

25 (Plaintiff's Exhibit 21 received in evidence)

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Martin - Cross

1 BY MR. MILLSAPS:

2 Q. Mr. Rothschild's lawyers are his agents as well as far as
3 you understand, isn't that right, Mr. Martin?

4 A. Yes.

5 MR. MILLSAPS: Ashley, would you please show this
6 document to the jury now.

7 Q. So communications from Mr. Rothschild's lawyer are
8 effectively communications from Mr. Rothschild, isn't that fair
9 to say?

10 A. Yes.

11 Q. Looking at this letter, isn't it the case that
12 Mr. Rothschild, through his lawyers, explained to Hermès that
13 MetaBirkins are artistic works depicting fur-covered Birkin
14 bags?

15 A. Yes.

16 Q. Now, you testified that Hermès sent its cease and desist
17 letter after you discovered that Mr. Rothschild was planning to
18 release more MetaBirkins NFTs, is that right?

19 A. Sorry. Can you repeat the question?

20 Q. Am I right that you testified that Hermès sent its cease
21 and desist letter to Mr. Rothschild after you discovered that
22 Mr. Rothschild was planning to release more MetaBirkins NFTs?

23 A. Yes.

24 Q. And am I right that you testified that you sent the cease
25 and desist letter after you discovered that Mr. Rothschild was

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Martin - Cross

1 planning to release digital image of a fanciful, fur-covered
2 horse charm?

3 MR. WARSHAVSKY: Objection.

4 THE COURT: Hang on a minute.

5 (Pause)

6 Ground?

7 MR. WARSHAVSKY: Mischaracterization.

8 THE COURT: Sustained.

9 BY MR. MILLSAPS:

10 Q. Mr. Martin, am I right that you testified that you sent a
11 cease and desist letter to Mr. Rothschild after you discovered
12 that he was planning to release some kind of horse item to
13 MetaBirkins' holders?

14 MR. WARSHAVSKY: Objection, your Honor.

15 THE COURT: Well, when you sent the cease and desist
16 letter, you've already said that was after you discovered that
17 he was planning some new digital images.

18 What were the new digital images that you understood?

19 THE WITNESS: I understood that it was new images of a
20 new batch of NFT. And if we talk about the rodeo, I saw the
21 rodeo charm before we sent the cease and desist letter.

22 Q. What was the rodeo charm?

23 A. It was introduced, if I remember correctly, as a gift,
24 potential gift to owner of Meta NFT.

25 Q. And that was also a two-dimensional digital image of a

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Martin - Cross

1 fur-covered horse charm, isn't that right?

2 A. If my memory is correct, yes.

3 Q. So, Mr. Martin, before lunch you then testified, correct me
4 if I'm wrong, that Hermès sent Mr. Rothschild a cease and
5 desist letter when it discovered these plans, but then had no
6 further contact with Mr. Rothschild; was that your testimony?

7 A. Yes, but for me, the answer from was not part -- I mean,
8 what I wanted to say -- perhaps I did it wrong -- is that I
9 had no direct contact with Mr. Rothschild after the cease and
10 desist letter. He answered through his lawyers, through his
11 lawyers. But I had no contact, Hermès had no direct contact
12 with Mr. Rothschild. That was the way I understood for me.

13 Q. So you don't consider contact through your lawyers who are
14 working as your agents to be Hermès having contact with
15 Mr. Rothschild?

16 MR. WARSHAVSKY: Objection.

17 THE COURT: Sustained.

18 I think he's indicated that he, all he was saying was
19 that he didn't have direct contact with Mr. Rothschild. The
20 jury can see that there were letters sent in both directions,
21 all containing the sweet nothings that are typical of lawyers'
22 letters.

23 MR. MILLSAPS: Your Honor, I would like to ask for a
24 sidebar before I continue with my questioning.

25 THE COURT: Sure.

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Martin - Cross

1 (At the sidebar)

2 MR. MILLSAPS: Judge, the issue is that

3 Mr. Warshavsky's questioning, he was asking him did Hermès --

4 Mr. Martin testified that they saw that Mr. Rothschild had all
5 of these plans to release these things and that they sent a
6 cease and desist letter. And then Mr. Warshavsky asked if
7 Hermès ever had any contact with Mr. Rothschild again. And
8 Mr. Martin said no, leaving a false impression.

9 THE COURT: But he's already indicated that he
10 misunderstood what was being asked there and that he was
11 referring to Mr. Rothschild in person and in his personal
12 capacity, not through his lawyers.

13 MR. MILLSAPS: Right.

14 THE COURT: You've brought this out, it's a fair
15 point, and you've brought it out repeatedly, but don't we need
16 to move on then.

17 MR. MILLSAPS: The only other point that I want to
18 make on this issue is that Mr. Rothschild, in fact, engaged in
19 extensive settlement negotiations for a while with Hermès, and
20 Hermès filed a lawsuit in the middle of those negotiations
21 without notifying Mr. Rothschild. He read about it in the
22 press.

23 THE COURT: Of course you know settlement discussions
24 are not admissible.

25 MR. MILLSAPS: Yes, your Honor.

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Martin - Cross

1 THE COURT: So you think the door has been opened by
2 that statement before, so what's your view?

3 MR. WARSHAVSKY: Your Honor, if they want to ask that,
4 I'm fine with it. But then I'm going to follow up and I want
5 to expose all of those settlement discussions. If they want to
6 talk about it, I would be more than happy to on
7 Mr. Rothschild's exam to follow up on what Mr. Rothschild's
8 demands were. If they are open to that, they can open this
9 door, and I'm more than happy for that.

10 I'm aware that --

11 MR. HARRIS: Your Honor, I don't think --

12 THE COURT: I can't hear you.

13 MR. HARRIS: I'm sorry, your Honor. I don't think we
14 wanted to get into the substance of the discussions. I think
15 we just wanted to say, which I think is actually admissible,
16 that discussions were held.

17 THE COURT: Well, that's why I think I will allow the
18 question to be put: Wasn't there subsequent settlement
19 discussions; yes or no? Answer, yes. And ultimately did they
20 not result in a settlement? Duh. Yes, that much I will allow.
21 That doesn't open the door to anything beyond that would open
22 the door.

23 MR. MILLSAPS: Thank you, your Honor.

24 (Continued on next page)

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Martin - Cross

1 (In open court)

2 BY MR. MILLSAPS:

3 Q. Mr. Martin, isn't it true that Mr. Rothschild not only
4 promptly responded to Hermès' cease and desist letter with a
5 letter from his own lawyers, but he also engaged in discussions
6 with Hermès about possible settlement?

7 THE COURT: You mean through his lawyers?

8 Q. Through his lawyers?

9 A. I think, yes.

10 Q. And are you aware if those conversations had concluded
11 before Hermès filed this lawsuit?

12 THE COURT: Sustained.

13 Q. Those settlement discussions obviously did not result in a
14 settlement, isn't that right, Mr. Martin?

15 THE COURT: If what you mean is that the matter, since
16 it hasn't been settled, has been left to the good judgment of
17 our jury, I think I can take judicial notice of that.

18 MR. MILLSAPS: Thank you, your Honor.

19 BY MR. MILLSAPS:

20 Q. Mr. Martin, when Hermès filed this lawsuit against
21 Mr. Rothschild, Mr. Rothschild was represented by the lawyers
22 that sent the response to the cease and desist letter, isn't
23 that right?

24 MR. WARSHAVSKY: Objection.

25 THE COURT: Unless there was earlier contact, I don't

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Martin - Cross

1 know how he would know that of his knowledge.

2 Sustained.

3 Q. Mr. Martin, when Hermès filed this lawsuit against
4 Mr. Rothschild, were you aware that Mr. Rothschild was still
5 represented by the lawyers to which he was engaging in
6 settlement discussions?

7 A. I would say yes.

8 Q. Do you know how Mr. Rothschild found out that Hermès filed
9 a lawsuit against him?

10 A. When we notified him of the claim.

11 Q. Do you know when you notified him of the complaint?

12 A. I don't remember the exact date.

13 Q. Do you know if your lawyers notified his lawyers of the
14 complaint before it went in the press or after it went into the
15 press?

16 THE COURT: Sustained.

17 Q. And, Mr. Martin, Mr. Rothschild never released any further
18 MetaBirkins NFTs, is that correct?

19 A. Yes.

20 Q. And Mr. Rothschild never released an image of a furry horse
21 charm, is that correct?

22 A. To my knowledge, yes.

23 MR. MILLSAPS: Ashley, would you please show
24 Plaintiff's Exhibit 14, which is in evidence.

25 Q. Mr. Martin, this is a Birkin bag that Hermès made and sold,

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Martin - Cross

1 is that right?

2 A. Yes.

3 Q. And you said that this bag is made with crocodile skin, is
4 that correct?

5 A. At least part of the same with fur and crocodile skin, yes.

6 Q. Was the crocodile skin waste from the food industry?

7 A. No.

8 Q. Do you know how much this bag sold for?

9 A. I don't remember.

10 Q. Would this be one of the more expensive or less expensive
11 Hermès bags?

12 A. I would say it would be an expensive one.

13 Q. Why would you say this one would be an expensive one?

14 A. Because of the material which is being used.

15 Q. Do you know where the fur that Hermès uses in products like
16 this bag comes from?

17 A. No.

18 Q. Is the fur waste from the food industry?

19 A. No.

20 Q. Has Hermès agreed to go fur-free like other fashion
21 companies have?

22 A. No.

23 Q. Now, do you recall earlier we were looking at a bunch of
24 magazine articles showing pictures of Birkin bags?

25 A. I'm sorry. Yes.